MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI

RESPONDENT,

v.

JOSEPH FOUNTAIN PERRY

APPELLANT.

DOCKET NUMBER WD78653
DATE: October 18, 2016

Appeal From:

Livingston County Circuit Court
The Honorable Thomas N. Chapman, Judge

Appellate Judges:

Division Two: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

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Attorneys:

Robert J. Bartholomew, Jr., Jefferson City, MO, for respondent.

Rosalynn Koch and Casey A. Taylor, Columbia, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

RESPONDENT,

v.

JOSEPH FOUNTAIN PERRY,

APPELLANT.

No. WD78653 Livingston County

Before Division Two: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Joseph Perry appeals from a jury conviction for possession of a controlled substance. Perry argues that the trial court erred in overruling his motion to suppress methamphetamine seized after an unlawful *Terry* stop.

Majority Opinion holds:

REVERSED.

Given the totality of the circumstances, Perry's initial encounter with law enforcement constituted a *Terry* stop subject to the Fourth Amendment. The State did not sustain its burden to establish that the *Terry* stop of Perry was supported by a reasonable suspicion that Perry was engaged in an illegal activity. The methamphetamine evidence seized as a result of the unlawful *Terry* stop should have been suppressed and excluded from evidence at trial.

Judge Mitchell's Dissenting Opinion, States:

The majority concludes that Perry was seized without reasonable suspicion in violation of the Fourth Amendment and, therefore, that the trial court erred in overruling his motion to suppress. While I agree with the majority that Officer Huber lacked any reasonable suspicion to believe that Perry was driving while suspended at the time she first encountered him, I disagree with the majority's conclusion that Perry was seized at any time before he voluntarily turned himself in to Sheriff Cox. I believe the majority applies the wrong standard for determining whether a seizure has occurred, and upon application of the proper standard, it is evident that at no time did Officer Huber effect a seizure implicating the Fourth Amendment.

The dissent holds:

1. Appellate courts are primarily concerned with the correctness of the result reached by the trial court; thus, the judgment will be affirmed if cognizable under any theory.

2. Here, because the trial court's decision overruling Perry's motion to suppress can be affirmed on the ground that there was no seizure, the State's arguments on appeal—to the extent they do not assert on appeal claims made below—are of no consequence.

3. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

4. For a seizure to exist upon a "show of authority," there must also be submission by the citizen to that show of authority.

5. The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation.

6. Here, Officer Huber did not pull Perry over; Perry stopped of his own accord upon reaching his destination (his girlfriend's house). "[I]t does not make sense to blame an officer for interfering with someone's liberty when a person stops of his own accord, particularly when the officer did nothing to effect the stop and did not intend to stop him." *U.S. v. Al Nasser*, 555 F.3d 722, 726 (9th Cir. 2009). Officer Huber testified that she never turned on her lights or siren and never attempted to stop Perry's truck. She indicated that she "didn't perform a traffic stop . . . [b]ecause he didn't violate any traffic laws."

7. Officer Huber's request to see Perry's license did not constitute a "show of authority," even when coupled with her asserted belief that his license was suspended, because it was nothing more than a request that carried with it no implication that compliance would be compelled. Officer Huber testified that she never yelled at Perry, never ordered him to put his hands in the air, never drew her weapon on him, did not block his vehicle in any way, and indicated that, during the encounter, until she saw the drugs, he was free to leave.

8. Once Officer Huber noticed Perry holding a small baggie in a clenched fist, she issued her first command for Perry to "come here for a minute." Though the record does not indicate her tone of voice, assuming this command constituted a show of authority, it still did not result in a seizure because Perry refused to comply.

9. When Officer Huber did engage in a show of authority, Perry did not submit. And because his earlier voluntary cooperation was merely part of a consensual encounter, at no point did Officer Huber seize Perry. Accordingly, the Fourth Amendment was not implicated, and the trial court committed no error in overruling Perry's motion to suppress.

Majority Opinion by Cynthia L. Martin, Judge with Judge Witt joining October 18, 2016
Dissenting Opinion by Karen King Mitchell, Judge

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